United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-6012

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

B P/S

ANTHONY B. CATALDO, and
ADA W. CATALDO,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

In the Matter of ANTHONY B. CATALDO, an attorney,

Appellant.

DOCKET NO.
75-6012

APPELLANT'S BRIEF

PETITION FOR RE-HEARING AND SUGGESTION
FOR AN EN-BANC HEARING THEREON

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

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Plaintiffs,

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DOCKET NO.
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Petition for Re-Hearing and a Suggestion for an En-Banc Hearing thereon.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT:

The petition of Anthony B. Cataldo to this honorable court respectfully shows:

FIRST: That petitioner is the appellant from an order made by the Hon. Richard H. Levet in a civil suit in the United States District Court for the Southern District of New York, wherein the plaintiffs and the defendant were as shown in the caption above and which held appellant for contempt and fined him $50. The $50. was paid under protest and this appeal ensued to correct the order of contempt, because it failed to comply with Rule 42 of the Criminal Rules as it was bad as to form and because there was no support in

the facts showing that petitioner had been contemptuous and had obstructed justice.

SECOND: This court, on September 30, 1975, dismissed the appeal saying,

(a) It was not timely, and

(b) It stated further,"In any event, in an excess of caution, we have heard argument on the merits of the contempt citation and can find no sufficient reason to disturb the judgment of the district court". A true copy of said decision is appended hereto as Exhibit A.

THIRD: It is respectfully submitted that both reasons for the dismissal are unlawful for the reasons stated in the following paragraphs.

FOURTH: This appeal was timely though filed almost two years after the date of the order of May 18, 1973 because it was filed within the time allowed by Rule 4 (b) of the Rules of Federal Procedure prescribing when appeals are taken from criminal judgments or orders.

FIFTH: Rule 4 of the Federal Rules of Appellate Procedure reads as follows:

Rule 4. Appeal as of Right-When Taken

(a) * * *

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the

> day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time other wise prescribed by this subdivision.

SIXTH: That at the time when the notice of appeal was filed herein the order appealed from had not been docketed in the criminal docket and accordingly this appeal is a timely appeal because the time to appeal therefrom had not yet started to run.

SEVENTH: The order of May 18, 1973, the order appealed from, was never denominated by the district court as a criminal judgment but was entered only as a civil order in the civil docket where the civil case is noted, viz; at 69 Civ. 407. It bears the caption of that civil case. It purports to hold petitioner for a contempt of an alleged claim of a civil contempt, and it purports to fine petitioner Fifty Dollars.

EIGHTH: On a timely appeal from the final judgment of the civil action, wherein a review was also sought of said order of contempt, this court stated, sua sponta, "In the course of the proceedings

in the District Court, appellant Anthony B. Cataldo was summoned to show cause why he should not be held in contempt. A judgment so holding was filed on May 18, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review." Attached is a true copy marked Exhibit B.

NINTH: There was nothing about said order of contempt dated May 18, 1973 which bespoke of a criminal contempt charge but, in fact, it alleges in its recital of proceedings that petitioner had been ordered to show cause why petitioner should not be held for a civil contempt. A civil contempt even though erroneously entered is not separately appealable but to review it, that must await an appeal from the final judgment in the civil action, see 11 Wright &. Miller, Federal Practice and Procedure, Section 2960. Such an appeal was taken and a review sought of the contempt order therein. No motion was made by appellee there that such procedure was incorrect and both sides argued, pro and con, the merits or lack of merits of the order as an issue on that appeal. No notice of any kind was given to petitioner that this court would treat the order as a criminal judgment. Acting on its own, this court did so without giving petitioner a fair opportunity to meet the issue of the appealability of that order as a criminal appeal. Yet, Rule 32 of the Federal Rules of Criminal Procedure requires that a judge shall advise a litigant of his right of appeal from a criminal judgment. Had petitioner been given notice, he would have called this court's attention to the fact that the order was not docketed in the criminal

docket and that the order was still open to an appeal even as a criminal order, and under the liberal practices initiated by the 1968 amendment of the rules, this court could have considered the merits on the civil appeal: see 9 Moore's Federal Practice, par. 201.8 and Sanders v. United States, 373 U.S. 1; where the Supreme Court said at p. 8: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringment of constitutional rights is alleged." Petitioner's right to remain free of a charge of contempt at the hands of judge who would abuse the power is a constitutionally protected right.

Further, petitioner would have called this court's attention to the fact that the said order of contempt had mistated the proceedings had before the district court in that there had been no order to show cause issued; there had not been any specification of charges, nor any notice of hearing on the unstated contempt charge, that no separate hearing on the contempt charge was held despite the statement in said order that such a hearing was held on the 11th and 14th days of May, 1973; that there were no minutes of such a hearing; that the only minutes of a hearing was the transcript of the trial proceeding which had ended on May 14, 1973; and that it was unlawful to enter a contempt order, whether civil or criminal, after the trial had ended without a trial on such charges, without specifications and notice of hearing before another judge; and that to do so violated Rule 42 of the Federal Rules of Criminal Procedure. The court's attention was called to the rule that as a civil contempt, the order was unlawfully entered because a civil contempt is issued

to coerce a party to obey an intermediate order within the litigation (such as an injunction); see Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 451. After the trial of a civil case, there can be no occasion to coerce a litigant to obey an intermediate order. In any event, there must be an intermediate order, and the order must be entered before trial. Here there was no intermediate order and the order of contempt was entered after trial. Hence, as a civil order of contempt, it was erroneously entered. This court was seriously in error when it refused to set the order aside on the civil appeal and it even violated appellant's constitutional right to a fair opportunity to say that he had not committed a contempt of court.

But, as this court called the said order of contempt a criminal judgment and on that basis it said that as no separate notice of appeal had been filed from said criminal (sic) judgment, it had no jurisdiction to consider the order. Consequently, an appeal from said order would be ruled by the Rules of Appellate Procedure relating to criminal judgments. Also, practice procedures would be ruled by the Federal Rules of Criminal Procedure. Notwithstanding, where this court acted upon a fact which did not exist, such as assuming that an order to show cause was issued by the trial judge and that he had held a hearing on it to determine appellant guilty of contempt, this court should have recognized its error in that earlier decision and set it aside, when the proof of the non-existence of such facts was made.

TENTH: Rule 42 of the Criminal Procedures deals with orders of criminal contempt. It reads as follows:

Rule 42

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The order on appeal does not comply with either part (a) or (b) of Rule 42. This is another reason why this court, sua sponta, should not have labelled the order a criminal judgment and for that reason, refuse to consider the order. Part (a) provides for a certification of summary contempt. It provides that such certification must state that the contempt was committed within the immediate presence and hearing of the court and it must specify the facts of contempt and it shall be docketed. This order does neither. There is no statement that a criminal contempt was entered or that any such contempt was

committed within the immediate presence or hearing of the court. The order was never entered in the criminal docket as a criminal judgment of contempt should be. Nor are the specific facts of contempt conduct stated; the generalizations stated therein are insufficient; see Tauber v. Gordon, 350 F. (2) 843; United States v. Seale, 461 F. (2) 345, 366; Widger v. United States, 244 F. (2) 103; and United States v. Camil, 497 F. (2) 225, 229; and United States v. Marshall, 451 F. (2) 372,375.

Nor were the provisions of 42 (b) observed.

In considering the constitutionality of the use of the contempt power in the Federal Court, our Supreme Court said in In re Michael, 326 U.S. 224, the history of the contempt statutes "reveal a Congressional intent to safeguard constitutional procedures by limiting courts as Congress is limited in contempt cases, to the least possible power adequate to the end proposed, Anderson v. Dunn, 6 Wheat, 204, 231. The exercise by the Federal Court of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights * * *." Here there was no consideration of petitioner's right to due process under the Fifth Amendment by the making of the order of contempt.

Professor Moore in Volume 8a of Federal Practice at par. 42.05 says that the use of contempt power conforms rather neatly to the totalitarian principle that order can be ensured only through fear of punishment by the state. This principle is, of course, quite

different from the concept of moral authority espoused by Justice Frankfurter * * * Recognizing, however, that judicial control of a trial calls for 'a rare combination of firmness and patience' appellate courts should be constantly alert to abuses at the trial level. He quotes the Supreme Court, In re McConnell, 370 U.S. 230, to deliniate the limits in confrontations between trial counsel and the court. He states, "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.", as a quote from the Supreme Court's decision at page 236. In re Dellinger, CA 7th, 461 F. (2) 389, at 397, has an excellent description of what does and does not amount to contempt in the usual confrontation between trial counsel and trial judge.

Petitioner did nothing on the trial that merited the imposition of the contempt charge but the record will bear out petitioner's claim that the $50 fine was uncertainly levied with promises of remission when petitioner answered a question asked of him by the judge. Furthermore, the whole record shows that the threat of contempt was used by the trial judge to prevent evidence from being adduced, even directing that offers of proof could not be made. He prejudged the relevancy and materiality of the evidence and in short, he terminated the trial to the great detriment of the plaintiffs, and, his language, alternately scolding and sarcastic of petitioner's efforts caused consternation in petitioner which kept him from knowing precisely what it was that the trial judge wanted. His garrolousness

and impatience is evident on nearly every page of the trial transcript. Also evident is the fact that petitioner did as he was told to do and wound up losing his case largely for lack of proof.

In this context of an unfair trial, four days after the trial ended, the trial judge issued the order under consideration. Though the order states that an order to show cause was made, that was not so. Also, the order states that a hearing was held on such order to show cause on the 11th and 14th days of May, 1973, and that is not a true fact either. No hearing on the contempt charge was held at all. On the 11th and 14th days of May, 1973, the trial of the civil action was continued and only evidence on the issues in that action was heard. None on a contempt charge. The appellee conceded that no separate hearing on a contempt charge was held on the argument of this appeal. Further, there was no notice of a hearing, no specification of the charges, nor any of the requirements to a valid order in accordance to Rule 42 (b) were followed. It also transgresses the rule of the Supreme Court in In re McConnell, 370 U.S. 230, and in Mannes v. Meyers, 419 U.S. 449, stating that an attorney's action in pressing his client's cause cannot be contemptuous lacking the intent to obstruct justice; or the rule in Mayberry v. Pennsylvania, 400 U.S. 455 and in Taylor v. Hayes, 418 U.S. 488 that a contempt charge, if not made summarily with a certification in compliance with Rule 42 (a) but is withheld until after the trial has finished, may not be issued without specifications, notice and hearing and if the feelings of the judge are involved, without the trial being before another judge. In fact, Taylor v. Hayes implies that a trial

before another judge is practically a necessity where the issue is between trial counsel and the trial judge to afford the attorney the full protection of the constitutional right to due process. Groppi v. Leslie, 404 U.S. 496, 502 is relied upon by the Taylor Court. See the foot note in Taylor at p. 499. In re Little, 404 U.S. 553 and Holt v. Virginia, 381 U.S. 131, are two more cases where intent to obstruct justice was to be found as a fact before an attorney may be committed for a criminal contempt for his actions in the prosecution of a cause in a courtroom.

Here, the transcript of the proceedings at the trial will show petitioner's compliance with the court's rulings, once the judge's instructions were understood, despite the palpable abuse of the contempt power under the circumstance. It was plain that that use was for the purpose of coercing petitioner into foregoing his own prepared plan of proof of his case and to follow the court's direction even though those directions would clearly lead to the defeat of his case for lack of proof. The trial judge was intent on finishing with the case, and he did, in his own time, and ended up by dismissing the complaint largely for lack of proof. The transcript will not support this trial judge's use of his contempt power whether it be called a civil or criminal contempt. The form of the order fails to comply with the requirements of Rule 42. Consequently, this court clearly erred in not appraising the problem properly. A true copy of said order of contempt is attached hereto as Exhibit C.

ELEVENTH: Consequently, when this court said on that earlier appeal from the civil judgment that petitioner was summoned to show cause, it was stating what the order stated; but it could not make that statement as a fact within the case because no such order was issued. This court's use of that statement in that earlier decision, and, it is respectfully submitted, this court's reliance upon an alleged order to show cause which did not exist was prejudicial to petitioner's constitutional right. Further, this court said in a footnote:

> "Although Cataldo was summoned to show cause why he should not be held for civil contempt, both appellants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed."

Again, this court, without support in the facts, concluded wrongfully.

(a) That appellants now treated the contempt judgment as criminal in nature, and

(b) That it was the judge's intent that it should be so construed.

It is respectfully submitted, that such fact finding contravene the clear statements in appellant's brief on that appeal that such contempt order was an unlawful order whether considered a civil contempt or a criminal contempt. There is absolutely nothing in said brief which says that petitioner adopted the order as a criminal judgment; much less does it say that appellant waived his right to claim it was a civil contempt and erroneous or that he waived his right of

appeal from that order if such time was still available to him under Rule 4 (b) of the Federal Rules of Appellate Procedure.

Also, it is respectfully submitted, that fact finding (b) has absolutely no basis in fact. The circumstances referred to by the court are not expressed. The actual fact is that the recitals of the order are clear and plainly states that a civil contempt was noticed. That though the conclusion in the order reads like a criminal contempt finding, that is only proof of the error of law made by the trial judge in making a conclusion of law that does not follow from the fact recited. Also, if there were any such circumstances as were envisaged by this court, Judge Levet would have seized upon the opportunity to express them when he later denied petitioner's motion to vacate, but he did not. After this court's decision on the appeal in the civil case, appellant moved before Judge Levet to vacate his order because this court had held it to be a criminal contempt and it was refused consideration upon the merits because of his error in denominating it as a civil contempt. Judge Levet denied that motion without discussing either the alleged intent to enter a criminal order or the fact that he had called the order as one in civil contempt. This order states no valid basis for the denial of the motion. Nor does it adopt the suggestion of this court that he intended to enter a criminal contempt order. A true copy of such order is appended hereto as Exhibit D.

It is also respectfully submitted that when, on this appeal, the foregoing prior conclusions of this court were proven to have no fact support, this court should have in the interest of justice,

corrected its decision on the earlier appeals, not rely upon its decision on the civil appeal as having juridically established the fact that "appellant himself characterized the order as a criminal contempt before our prior decision". The proof of the truth that no such characterization was made or that petitioner had not effectively waived his right to appeal was explained on the argument of this appeal. If it is the object of all litigation that the truth of the facts be found and acted upon, this court has seriously failed to do that, but applied the former finding of fact which was proven to have no basis in the facts before the court to claim it as a basis for the new decision.

TWELFTH: As a consequence, it is respectfully submitted, that this court erred when it refused to acknowledge that rule 4 (b) permits an appeal of the order of contempt if the notice of appeal is filed before the order was entered in the criminal docket.

Furthermore, the second sentence of Rule 4 (b) states that an appeal is timely and properly taken from a criminal judgment if the notice of appeal is filed prior to the entry of the judgment or order. Criminal judgments are entered in the criminal docket, not in the civil docket. If the notice of appeal is filed before the entry of the criminal judgment, the rule goes on to say that the notice shall be treated as filed after such entry and on the day filed. This provision of the rule codifies the principle enunciated in Lemke v. United States, 346 U.S. 325, where the Supreme Court had stated that a notice of appeal from a criminal judgment filed before the entry of the criminal judgment is a timely appeal; see 9 Moores, Federal

Practice, par. 203.35 (2) p. 794.

THIRTEENTH: In justification for refusing to follow Rule 4 (b), this court referred to the provision of Rule 4 (b) reading, "A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket", and said in respect thereof; "But whatever the intent of that provision in the usual case, see 9 Moores, Federal Practice, paragraph 203.35 at 795, it was not meant to extend the time for appeal indefinitely on facts like these, where appellant himself characterized the order as criminal contempt before our prior decision and filed no notice of appeal even after it for nearly ten months, preferring instead to seek another remedy in the district court."

Professor Moore at the paragraph cited by this court expressly states that the foregoing sentence was inserted for the protection of a litigant aggrieved of a criminal judgment to clarify the time when his appeal right would begin to run. Talking about the amendments made to old rule 73 by the 1968 rules, Professor Moore states at p. 795: "(4) The sixth sentence is added to fix the precise time at which a judgment is entered. There has been some doubt on the point. In Richards[illegible] v. United States, 192 F. (2) 602 (D.C. Cir. 1951) it was held that the time for appeal ran not from the date of the sentencing, nor from the date the judgment was signed, but from the date it was filed and entered in the docket. But dicta in Hyche v. United States, 278 F. (2) 915 (5th Cir. 1960) and United States v. Isabella, 251 F. (2) 223 (2nd Cir. 1958) state that the time for appeal starts to run from the time of the sentence in open court." It is

respectfully submitted that this exposition by Professor Moore clearly says that the time to appeal starts to run from the docketing of the order in the criminal docket and not as this court has opined that it was not meant to extend the time to appeal indefinitely for reasons which do not exist in fact. How can the time to appeal be extended if it had never started to run? How can a timely filing be equated with an extension of time? If Judge Levet had acted according to law, he could have docketed the order in the criminal docket. Or, the United States Attorney could have done so, after this court had denominated it a criminal appeal. Neither did anything about it. Their omission is now visited upon petitioner to take his rights from him. This is a serious violation upon the rights of appellant, which this court is urged, in the interest of substantial justice, to correct.

Nor is the remark that petitioner preferred to seek another remedy, a waiver or even relevant to the time when an appeal may be taken from a criminal judgment. That alludes to the motion made by petitioner to Judge Levet immediately upon the publishing of this court's decision on the civil appeal in which it called the order of contempt a criminal judgment. When that motion was denied; see Exhibit D, an appeal (docket No. 74-2537) followed. That appeal was from the order of October 17, 1974 which is Exhibit D. The appellee moved to dismiss the appeal which motion was heard with the appeal in chief. The main point of the United States Attorney for dismissal and the only point he argued was for dismissal because no appeal lies from a Rule 60 (b) motion. Rule 60 (b) is a Civil rule; whereas the motion was made in respect of a criminal judgment and was ruled by Rule 33

and 36 of the Criminal Rules. Upon the argument, this court ordered petitioner not to discuss the merits of the order of contempt but to discuss the motion to dismiss. Petitioner insisted that the merits of the contempt order could be considered on an appeal from an order denying its vacature. Such a motion may be made under Rule 33 of the Criminal Rule up to two years of the judgment date for newly discovered evidence and certainly this court's holding that the order should be treated as a criminal order was newly discovered evidence. A denial of such a motion is appealable; see 2 Wright, Rule 33, Sec. 559 and the cases cited there. This court, nevertheless, affirmed summarily upon the argument of the United States Attorney that the appeal could not be taken from a Rule 60 (b) order of denial.

When the motion to vacate was made to Judge Levet, petitioner had the option of proceeding to move to vacate under Rule 33 or even Rule 36 of the Criminal Rules or to appeal from the order of contempt directly. Petitioner had not denominated the Rule under which he had moved but, one thing is certain, he could not have moved under the Civil Rules. The United States Attorney injected the idea that the motion was a Rule 60 (b) motion and he succeded in confusing the issues. Again there was no decision on the merits of the order of contempt. In proof of the fact that that appeal was not res judicata of this appeal, this court did not accept the argument of res judicata made by the United States Attorney on this appeal. It could not as the notices of appeal were from separate orders.

The other option, of course, was to notice the appeal from the order of contempt itself. That is this appeal. Again, the exercise

of the option to move to vacate cannot be a waiver of the appeal granted by Rule 4 (b). This appeal was docketed the day after this court refused to hear the merits the second time.

At no time was there any time lag between proceedings, petitioner acted diligently on each occasion. The time lag between May 16, 1973 and April 18, 1975 was the processing of the steps which were initiated in consequence of this court's error of refusing to reverse the order on the civil appeal. The time spent was court consumed time not petitioner's delays.

FOURTEENTH: It is respectfully submitted that this court could not amend a statutory right to appeal in order to foreclose an appeal where it is permitted by statute. Rule 4 (b) is a rule of the Supreme Court made on December 14, 1967 and reported to Congress on January 15, 1968; 9 Moore, Federal Practice, Par. 201.09, and has the force of a statute. Whatever the reason for the rule, it does not give this court authority to start the running of the time to appeal from a criminal judgment or order to a time earlier than as is stipulated in the statute and it ought not to do so after a litigant has complied with that statute and is pressing the appeal upon its merits in lawful fashion, and especially as in this case when petitioner was placed in the position of filing the appeal by this court's refusal to review the order on the merits on two earlier occasions. The statute is clear and unambiguous as to when the time to appeal starts to run from a criminal order and it is respectfully submitted, this court has no right to change, modify or amend that rule. Doing so, it transgressed the Rules laid down by the Supreme Court. Also see

Utah Junk Co. v. Porter, 328 U.S. 39, where the court said of an amendment to the Price Control Act, permitting "any" protest to be filed. "But in construing a definite procedural provision we will do well to stick close to the text * * *".

FIFTEENTH: Nor does the last paragraph of the decision state a lawful conclusion; see second page of Exhibit A or paragraph Second, supra. If it is meant to be on the merits of this appeal, this court erred because it did not have the transcript where the proof of what happened on the trial, is to be found. If it is not meant to be on the merits. then it is respectfully submitted that it is not fair to say that there is no sufficient reason to disturb the judgment on the basis of the oral arguments heard. Arguments are not proof of the facts, they are claims of counsel. The claims of defense counsel could not be given any weight over petitioner's claims because he was not present at the trial and he offered no citations to the page of the transcript where proof of his claims could be found. In contrast petitioner's claims are stated from personal knowledge and since he had the negative of the proposition, his claims to errors of the trial judge did not need citations to specific pages of the transcript because the whole transcript supported them.

Petitioner's oral argument had been written out and he read it to the court. This court may have his argument to see for itself that this court could not have found "nothing" to disturb the order. Petitioner recites therein all the Supreme Court cases saying that a general allegation of a fact is not sufficient to support a charge of contempt and that when it comes to a holding a trial-counsel for contempt, the right of counsel to press his client's case in the best manner

known to counsel must be allowed for. At any rate, the court could not have properly decided that insufficient was stated on the argument to disturb the judgment because it was unlawful to say that petitioner's arguments were untrue and that the government's counsel's arguments were true without proof of the truth.

The merits were not reached because this court did not read the transcript of the trial where the proof of the merits would be found; see United States v. Seale, 461 F. (2) 366, 369. The transcript has been lost ever since it was returned to the district court on the mandate on the prior appeal. The record of the district court sent to this court lacked the transcript of the trial and the deposition of the Internal Revenue agent, Levine. Petitioner had again checked prior to the argument and the clerks had not found the transcript. He checked after the decision was published and found that the clerks of both courts did not have the transcript in their files and the clerk of whom a request for a search for the missing parts of the record was made, stated that the search failed to find the transcript. So that, this court did not have the transcript of the trial before it and it could not have passed upon the merits. Petitioner has a copy of such transcript. It will prove that no contempt was committed. He would have submitted it to the court if any issue had been raised about the proof of petitioner's claims. Appellee never called for it nor showed any interest in meeting his burden of proof.

This is the whole crux of the matter. The transcript shows no facts to support a valid exercise of the power of contempt and this court has three times failed to examine the transcript for the proof.

On the last occasion, it is respectfully submitted, this court should not have said anything about the quality of the decision if it felt that the notice of appeal was untimely. The manner of its doing so, it is respectfully submitted, deprived petitioner of a fair hearing on the merits.

SIXTEENTH: Petitioner certifies under penalty of purjury that this application is being made not for the purpose of delay or harassment, but in a good faith belief that this court has erred seriously and has deprived him of the basic right to practice law in the federal court without fear that he will be held in contempt of court. Not only has this court erred on this appeal, but an impartial consideration of all three appeals will show that this court acted on findings which were against the truth of the facts. Even on the civil appeal this court failed to note the palpable errors of the trial court which had made the trial an unfair one. Perjury had been committed by defendant's witness, induced by defense counsel, proof of which was offered to the trial court. The court did nothing about it. This was in addition to the action of the trial court explained above. Then the three refusals of this court to look at the merits of the order of contempt were additional instances of serious error.

It is respectfully prayed that if the panel will not act to correct such errant action that this court does affirmatively recognize the unfair plight of a lawyer in good standing in this community being branded a criminal without proof and against the proof offered by him establishing his innocence.

Petitioner wishes to call attention to the situation con-

fronting the Supreme Court. Newspaper reports have stated that more than 800 petitions for writs of certiorari were filed over the summer months. It could hardly be expected to recognize less than 10% of them and do justice to those granted the writs. The odds of having the merits reviewed by our Supreme Court are so small that petitioner feels that this court should re-consider its decisions, in the interest of substantial justice, to correct the obvious errors carrying such serious consequences for him.

WHEREFORE it is respectfully submitted that either a re-hearing is had and the suggested amendment to Rule 4 (b) re-considered and that the merits of the order be gone into by examining the trial transcript or this court should, en banc, consider whether Rule 4 (b) shall or shall not be amended by this court and then, it should go over the transcript to find whether a contempt, as defined by our Supreme Court has been committed.

WHEREFORE the matter is respectfully submitted by

Anthony B. Cataldo

ANTHONY B. CATALDO
Attorney for appellant, pro se.

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of September one thousand nine hundred and seventy-five

Present:

HONORABLE LEONARD P. MOORE,

HONORABLE WILFRED FEINBERG,

HONORABLE JAMES L. OAKES,

Circuit Judges,

- -

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs-Appellants,

-against- No. 75-6012

UNITED STATES OF AMERICA,

Defendant-Appellee.

- -

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant pro se and by counsel for appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered that the appeal is dismissed. The order appealed from was a finding of criminal contempt. See Cataldo v. United States, 501 F.2d 396 (2d Cir. 1974). The notice of appeal from the order should have been filed within ten days from May 18, 1973. Instead, it was filed almost two years later. Appellant claims that the notice was timely because the contempt order was entered on the civil docket rather than on the criminal docket and the time for appeal had not yet started to run under the provision of Rule 4(b) of the Federal Rules of Appellate Procedure that "A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket." But whatever the intent of that provision in the usual case, see 9 Moore, Federal Practice ¶ 203.35, at 795, it was not meant to extend the time for appeal indefinitely on facts like these, where appellant himself characterized the order as criminal contempt before our prior decision and filed no notice of appeal even after it for nearly ten months, preferring instead to seek another remedy in the district court.

Exhibit A

In any event, in an excess of caution, we have heard argument on the merits of the contempt citation and can find no sufficient reason to disturb the judgment of the district court.

Edward P. Moore

Wilfred Feinberg

James L. Oakes

September 30, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1105—September Term, 1973.

(Argued May 30, 1974 Decided June 25, 1974.)

Docket No. 73-2602

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Levet, *Judge*, denying appellants' claim for an income tax refund.

Affirmed.

ANTHONY B. CATALDO, New York, N. Y., *for appellants and pro se.*

T. GORMAN REILLY, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, New York, N. Y.,

Exhibit B

and David P. Land, Assistant United States Attorney, of counsel), *for appellee.*

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, denying appellants' claim for an income tax refund for the year 1963. Appellants have broadly attacked the decision of the District Court and the fairness of the proceedings before it. We have carefully considered the record and the transcripts of that trial and the briefs submitted to us by the parties and have concluded that appellants were afforded a fair trial and that the District Court did not err in finding for the Government. We therefore affirm.

In the course of the proceedings in the District Court, appellant Anthony B. Cataldo was summoned to show cause why he should not be held in contempt.[1] A judgment so holding was filed on May 18, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review.

Judgment affirmed.

---

1 Although Cataldo was summoned to show cause why he should not be held for civil contempt, both appellants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed.

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-A19-

CONTEMPT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs,

69 Civil 407

-against-

UNITED STATES OF AMERICA,

Defendant.

- -

- -

IN THE MATTER OF

ANTHONY B. CATALDO,

AN ATTORNEY.

- -

Anthony B. Cataldo, an attorney, having appeared before this court on May 10, 11 and 14, 1973 as pro se attorney and attorney for Ada W. Cataldo, and the said attorney, after having been admonished by this court with respect to repeated refusal to obey the direction of the court and repeatedly having interrupted the court and continuing to argue matters of evidentiary rulings contrary to the direction of the court, having been required to show cause why he should not be held for civil contempt, and after hearing the said Anthony B. Cataldo on the 11th and 14th days of May 1973, it is

ADJUDGED that the said Anthony B. Cataldo is guilty of contempt of court, and it is further

ADJUDGED that the said Anthony B. Cataldo be fined the sum of Fifty ($50.00) Dollars.

Dated: New York, N.Y.
May 18, 1973.

(SGD) RICHARD H. LEVET
United States District Judge

A TRUE COPY
THOMAS E. ANDREWS, Clerk

By [illegible]
Deputy Clerk

THOMAS E. ANDREWS,
Clerk

Exhibit C

MEMO-DECISION
ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

69 Civil 407

#41316

MEMORANDUM

APPEARANCES:

Anthony B. Cataldo
Attorney for plaintiffs and pro se
111 Broadway
New York, N.Y.

Whitney North Seymour, Jr., United States Attorney
for the Southern District of New York
Attorney for Defendant
David P. Land, Assistant United States Attorney,
Of Counsel.

LEVET, D. J.

On May 10, May 11 and May 14, 1973, during a trial held before the undersigned, the court determined that Anthony B. Cataldo ("Cataldo") was in contempt by reason of his acts during the trial. A contempt fine of $50 was imposed by order of May 18, 1973. On or about May 31, 1973 Cataldo paid the said fine of $50.

Thereafter, although an appeal was taken on the action itself (a tax recovery suit), no appeal was taken from the contempt

order. At the time of the appeal to the Second Circuit Court of Appeals the court entered the following notation:

> "Although appellants proffer various arguments attacking the validity of the latter [contempt] judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review." Cataldo, et ux. v. United States of America, Docket No. 73-2602 (No. 1105, 2d Cir., June 25, 1974).

Now, under a notice of motion dated October 1, 1974, the above-named Cataldo moved for an order remitting the penalty upon an affidavit signed and sworn to September 30, 1974.

The basic determination in the District Court by the undersigned was affirmed by an order of affirmance on July 23, 1974, and an application by Cataldo to the Supreme Court for enlargement of his time to file a petition for certiorari was denied by the Supreme Court on September 25, 1974, as this court is informed. As above stated, the Court of Appeals refused to review the contempt order.

On October 15, 1974 the court received a letter from Cataldo dated October 14, 1974, which letter is attached hereto.

Under the above circumstances, I see no basis whatsoever for the granting of the application made by Cataldo. It is therefore denied.

So ordered.

Dated: New York, N.Y.
October 16, 1974.

Richard H. Levet
United States District Judge

STATE OF NEW YORK, COUNTY OF ss.: AFFIDAVIT OF SERVICE BY MAIL

Patricia Graham

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, N.Y.

That on the 23rd day of October 1975 deponent served the within Appellant's Brief upon Hon. Paul J. Curran, United States Attorney attorney(s) for ~~defendant~~ appellee in this action, at St. Andrews Plaza, N.Y.N.Y. 10007 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this 23rd day of October 1975 Patricia Graham

Anthony B. Cataldo

ANTHONY B. CATALDO
Notary Public, State of New York
No. 41-5630500 Qualified in Queens County
Certificate filed with New York Co. Clk's Office
Commission Expires March 30, 19 76